MATCHING THE THEORY OF THE CASE TO THE THEORY OF MITIGATION
(from Defending the Death Penalty Case: What Makes Death Different?, by Andrea Lyon)

Just as it would be foolish to try a case with two conflicting defenses ("I wasn't there, but if I was, I was insane"), it is *literally* deadly to fail to integrate the theory of the case with the theory of mitigation. If the jury perceives defense counsel as insincere or tricky because his theories conflict, a jury will undoubtedly take that out on the client. Former Appellate Justice R. Eugene Pinchman, a famous defense lawyer, once said: "When you get a case in your office there's three baskets, one of the baskets is `you can't lost it,' a very small basket, one of the baskets is `you can't win it,' a big basket, and then there's this basket in the middle called `maybe so.'" The "maybe so's," of course, are the ones that worry the attorney the most. They are the cases in which the preparation, skill and zeal of the attorney make the most difference. This section of the Article deals with the "maybe so" and the "can't win" baskets because the "can't lose" basket, even if it is technically a death penalty case, never is. In other words, if there is a really good defense on the facts, it is just not a death penalty case. Remember, it is hard to defend a death penalty case on the facts since the attorney must do so before death-qualified juries which are more prone to convict.

Develop a theory of trial that compliments and does not fight with the theory of mitigation. It is not good to put on a "he didn't do it" defense and a "he is sorry he did it" mitigation. The just does not work. The jury will give the death penalty to the client and, in essence, the attorney. Thus, it is of paramount importance to prepare for trial and for sentencing at the beginning of your representation.[1]

Of the "can't win" cases, there are those that absolutely cannot be won and those that probably cannot be won, but lightning might strike the jury box. In the "definitely won't win" category was Robert Jones's case.[2] Five eyewitnesses saw Robert go into the pool hall to rob it. He left a palm print on the door and signed a twenty-one page court reported confession. Robert's co-conspirator, the girlfriend of the man killed during the robbery, gave a court reported statement. The prosecution recovered keys to the pool hall that the girlfriend had given to Jones. The prosecution also had in custody a codefendant who gave Jones the gun, which was matched ballistically to the bullet recovered in the body of the deceased. It was fair to say there was not a lot of reasonable doubt in the case.

There just was not a theory that means "not guilty" anywhere in that case file. But what was the client's statement? The client's statement was "I went in there to rob him." The client had a drug problem. "I go in there to rob him. I pull the gun. I say give me the money, and he says [an expletive] and when he goes for the gun, it goes off." The physical evidence did not contradict the possibility that the gun could have gone off during a struggle. It was a close wound and not a contact wound.

So what was the theory of defense? Not that Jones was "not guilty," but rather, that although this was a felony murder, it was not intentional murder. That was the argument at the guilty-innocence phase. What verdict did the jury sign? Guilty of murder, of course, but because the theory of the case fit the facts and was not ridiculous, the theory of the case matched the mitigation theory. That theory included remorse, the fact that Jones had been a pretty good kid until his alcoholic father left home, and he became involved with some bad kids and drugs and developed a drug habit that caused him to commit the crime. It is important to emphasize that

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The author assumes that no attorney would plead his client guilty of a death penalty case without a guarantee from the judge or an offer from the prosecutor.

The author has changed the names of clients, witnesses, and other parties for this Article.

his drug habit was not an excuse or defense, but rather an explanation and a reason to punish with less than death. This fit the nonintentional murder theory, which really was not a theory of defense, but a good predicate to the theory of mitigation.

In the "almost certainly won't win" category is the psychiatric defense. Almost no one has won a psychiatric defense since the *Hinckley* case.[3] In such a case, jurors believe they are in essence being asked to forgive and let a defendant go by finding the defendant not guilty by reason of insanity. A death-qualified jury is especially unlikely to do that.[4]

James Morgan was in the middle of a divorce. He was a black police officer on disability as a result of a gunshot wound. Because of the gunshot wound, Morgan suffered from Brown-Sequared syndrome, which meant, among other things, that Morgan could not walk far without falling down. Morgan went to court in a wheelchair and, in front of seventeen eyewitnesses, shot the white divorce judge and his wife's white lawyer, because he had taken three oaths in his life. One oath was to serve his country, one oath was to serve the police department, and one oath, made to God, was to stay married to his woman for life. Since the judge and his wife's lawyer were trying to make him break an oath to God, Morgan believed that God required him to eliminate them. That was Morgan's defense and a clue to his attorneys that an insanity defense was in order. Morgan, however, did not want an insanity defense because he wanted to get the death penalty. Morgan believed a death penalty sentence would force the Illinois Supreme Court to agree with him that divorces should not be granted. The truth of the matter was that everyone on the jury knew James Morgan was crazy. The jury, however, was not going to let him go, which was what they thought they would be doing by finding him not guilty by reason of insanity. Thus, the trial was one long mitigation hearing.[5]

Consider now that category of cases in which it is unlikely the attorney will win before a death-qualified jury. An example of this is a case in which the defense is misidentification, but there is corroborating evidence of more than one identifying witness, or perhaps a distinguishing characteristic. Consider, for example, the case of Gregory Ortiz. Ortiz was a six-foot, nine inch tall Puerto Rican. This was a problematic distinguishing characteristic, and made it unlikely that the case could be won, especially since three people identified him.[6] With a homogeneous, Witherspooned jury,[7] the odds of winning the case were very low, not impossible, but very low.

United States v. Hinckley, 525 F.Supp. 1342 (D.C. 1981), *aff'd,* 672 F.2d 115 (D.C. Cir. 1982).

See Ellsworth, Bukaty, Cowan & Thompson, *The Death Qualified Jury and the Defense of Insanity,* 8 Law & Hum. Behav. 81 (1984).

He was very angry with his attorneys when the jury did not impose death.

To try to combat this distinguishing characteristic, several Latino starters from the Clemente High School baseball team were put in the audience. They were tall, 6'6" and 6'7". During the testimony of one of the witnesses, they stood up to test the witness's ability to judge height. The court sustained the State's objection to this procedure.

By "Witherspooned jury" I mean one qualified to return the death penalty under the standards laid out in Witherspoon v. Illinois, 391 U.S. 310 (1968). In Witherspoon the Court held the death penalty may not be imposed if the selection of jurors excluded potential jurors who expressed only a general objection to capital punishment; or a general religious or conscientious objection to it. However, the Court also held it is permissible to exclude a potential juror who expresses an unwillingness to even consider returning a verdict of death regardless of the evidence presented.

So what was the matching theory of mitigation if the case was lost? The theory of mitigation came from *Lockhart v. McCree.*[8] Justice Rehnquist's majority opinion held that "residual doubts" from the trial may inure to defendant's benefit at the penalty phase.[9] As awful as that is as a justification for conviction-prone juries, it is nonetheless, the basis for [argument.]

Thus, the theory of mitigation had two parts. First, there were some small remaining doubts of guilt. Second, there was substantial evidence of mitigation[10] to present to the jury, not because the defense conceded guilt, but because it was too difficult a decision for the jury to make without mitigation. Then all of the good things Gregory did in his life were presented to tell the jury. If they were *right,* and he was guilty, he should not die. But if they were wrong, there was a doubly strong reason not to kill him. It is clear that to win a death penalty hearing, the theory of the trial must complement, support, and lay the groundwork for the theory of mitigation.

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476 U.S. 162 (1986).

Id. at 181.

There is NEVER any case in which mitigation is not presented.